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BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

UTAH CHAPTER OF THE SIERRA CLUB, NATURAL RESOURCES DEFENSE COUNCIL, SOUTHERN UTAH WILDERNESS ALLIANCE, AND THE NATIONAL PARKS CONSERVATION ASSOCIATION Petitioners, v. DIVISION OF OIL, GAS, & MINING DEPARTMENT OF NATURAL RESOURCES, STATE OF UTAH Respondent, ALTON COAL DEVELOPMENT, LLC, Respondent/Intervenor.	**REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS ALTON COAL DEVELOPMENT'S PETITION FOR AWARD OF COSTS AND EXPENSES** Docket No. 2009-019 Cause No. C/025/005

The Utah Chapter of the Sierra Club, the Natural Resources Defense Council, the Southern Utah Wilderness Alliance, and the National Parks Conservation Association ("Petitioners")

hereby submit their Reply Memorandum in Support of Motion to Dismiss Alton Coal Development's (ACD) Petition for Award of Costs and Expenses.

INTRODUCTION

In their motion to dismiss, Petitioners raised three general arguments that warrant the dismissal of ACD's petition for attorney fees and costs: 1) ACD's petition does not state a *prima facie* claim that Petitioners' underlying petition for agency relief was frivolous, a threshold component under Rule B-15; 2) ACD's petition does not state a *prima facie* claim that Petitioners acted for the purpose of harassing or embarrassing ACD (let alone the sole purpose, as required); and 3) ACD's petition and interpretation of Rule B-15, if accepted, would infringe upon Petitioners' constitutional rights of speech and petition.[1]

In response, ACD argues that 1) its Petition is sufficient under Rule 8(a)'s pleading standards; 2) its allegations "satisfy any requirement to plead 'subjective' bad faith"; 3) it is not required to show both objective and subjective bad faith under Rule B-15; and 4) Petitioners' other arguments "are inapplicable to a motion to dismiss." ACD's contentions are simply not correct under Utah law.

[1] Petitioners also noted that, under the express language of Rule B-15, the Board retains discretion to deny fees even assuming the truth of ACD's allegations regarding objective or subjective bad faith. That discretion might reflect the Board's familiarity with the proceedings as a whole or the goals of public participation. If the Board is inclined to deny fees upon discretionary grounds, it may dismiss the petition without reaching the parties' legal or factual arguments.

ARGUMENT

I. ACD's Petition Does Not Meet its Burden Through Making Simple Allegations of Subjective Bad Faith.

ACD's first argument is that a mere allegation that a party acted in bad faith is sufficient to avoid dismissal because U.R.Civ.P. Rule 8(a) requires only a "'short and plain' statement explaining its claim." *ACD Opp.*, p. 2. Utah courts disagree. "Mere conclusory allegations in a pleading, unsupported by a recitation of relevant surrounding facts, are insufficient to preclude dismissal or summary judgment." *Commonwealth Prop. Advocates, LLC v. Mortgage Elec. Registration Sys., Inc.*, 2011 UT App 232 ¶16, 263 P.3d 397, 404 (citations omitted). A court need not accept "a complaint's legal conclusions, deductions, and opinions couched as facts." *Id.* (*citing Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). ACD's vague and conclusory allegations are inadequate under Utah Rules of Civil Procedure. *Koerber v. Mismash*, 2013 UT App 266 ¶6, 315 P.3d 1053, 1054-55; *Heathman v. Hatch*, 13 Utah 2d 266, 372 P.2d 990 (1962) (use of terms "fraud," "conspiracy," and "negligence" were conclusory allegations which, without setting out of facts sufficient to constitute the charged actions, could not withstand a motion to dimiss). Because Alton's fee petition does not allege *non-conclusory* facts that, if proven, would *show* "bad faith" and a purpose to "harass or embarrass" ACD, the fee petition does not meet Utah's pleading standard.

ACD's contention is also contrary to administrative rules governing the content of requests for agency action.[2] Under Rules R641-104-133.500 and R641-104-133.700, a petition must include, respectively, "a statement of the legal authority" under which the Board is requested to act and "a statement of the facts and reasons forming the basis for relief." The requirement that ACD's petition must identify "facts and reasons" supporting its request for attorney fees is reflected in the Board's Interim Order on Discovery, which ordered ACD to address in any petition for fees "the bad faith standard and the reasons for ACD's allegations concerning bad faith." In short, any suggestion by ACD that its petition need not identify supporting facts is contrary to Utah case law and administrative rules.[3]

II. ACD Has Not Pled A Prima Facie Case Of Objective Or Subjective Bad Faith.

ACD essentially concedes the insufficiency of its Petition if, as Petitioners and the Division contend, Rule B-15 requires a threshold showing of objective bad faith. In its opposing memorandum, ACD acknowledges that it has not alleged that Petitioners' underlying petition met that standard; instead, it has alleged only that it was "meritless." *See ACD Opp.*, p. 4 ("Alton made the allegation that Petitioners' claims were meritless, and that allegation must be accepted as true for purposes of their motion to dismiss.")

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[2] Under Admin R. 641-104-100, a "petition" is the same as a "request for agency action."

[3] ACD cites *LaRosa Fuel Co. v. OSMRE*, 159 I.B.L.A. 203 (June 9, 2003), to suggest that all it need do is recite certain words to survive dismissal. Utah law clearly says otherwise, of course. *See supra.* In any event, *LaRosa* dealt exclusively with jurisdictional and standing issues and did not the underlying determination of bad faith. Moreover, the discussion of the petitioner's allegations is perfunctory and never analyzed. From the opinion, there is no way to know the allegations' contents, the contents of the record, or, indeed, the adjudication of the merits of the fee request.

If one thing is settled under Utah law, it is that a determination that a party's position lacked merit is insufficient to meet the frivolousness requirement when seeking attorney fees under a bad faith standard. *See Petitioners' Memorandum Supporting Motion to Dismiss*, p. 9. ACD's acknowledgment that it alleges nothing more than ultimate lack of merit in itself compels a dismissal of the petition.

Separately, ACD also has not pled a prima facie case of subjective bad faith. ACD makes the remarkable assertion that the filing of a petition for agency relief in itself qualifies as harassment because "[l]itigation is usually expensive, and often lengthy," and therefore, "bad faith harassment arises when a litigant initiates the process with the specific intent to subject his opponent to those costs and delays." *ACD Opp.*, p. 5.

That assertion cannot withstand scrutiny. First, Utah law expressly allows concerned groups to seek modification or denial of a mining permit; if that process is expensive and lengthy in a particular case, it is because that is what is needed to resolve the issue(s). ACD should address its criticism of the process to the state legislature that authorized it, not seek to penalize petitioners for exercising their statutory rights. As it stands, Utah law *encourages* public participation in connection with mining permits, and public participation often will be in the form of such a petition. *See Order on Reconsideration of Ruling Concerning Legal Standard Governing Fee Petitions* at 10 (citing Utah Code Ann. § 40-10-2(4)).

Second, ACD's principal support for its position is the statement of a *lobbyist* before a Senate subcommittee. *See ACD Opp.*, p. 5. Lobbyists are, by definition, advocating in support of a client's position – such testimony is about as (un)persuasive as complaints by a party's

lawyer would be on the subject.[4] ACD has cited no case, from any jurisdiction, that has credited the arguments of a lobbyist as evidence of legislative intent.

ACD further argues that the attorney fee provisions are not "punitive" in nature, because Congress did not grant the lobbyist's request for an additional "punitive damages" provision in the statute, and the statute's preamble does not use the word punitive. *ACD Opp.*, p. 5 n.2. Of course, attorney fees and punitive damages are quite different concepts. Regardless, however, the absence of a punitive *damages* provision does not change the fact – recognized by the United States Supreme Court itself (*see Petitioners' Memorandum Supporting Motion to Dismiss*, p. 3) – that "bad faith" attorney fee provisions are inherently punitive in nature: They are designed and intended to be awarded *only* against litigants who bring claims that are objectively frivolous and brought for an ulterior and improper purpose of harassment or embarrassment.

Finally, ACD argues that Rule B-15 does not require that harassment or embarrassment be a petitioner's sole purpose. ACD first argues that the Secretary chose not to use the words "sole purpose" when promulgating the rule. *ACD Opp.*, p. 6. That is true – but the Secretary achieved the same result by using the definite article "the" ("for *the* purpose of..."). In construing a statute, the "definite article 'the' particularizes the subject which it precedes and is word of limitation as opposed to indefinite or generalizing force 'a' or 'an.'" *Black's Law Dictionary* 1477 (6th ed. 1990); *accord Colorado v. Sunoco, Inc.*, 337 F.3d 1233, 1241 (10th Cir. 2003);

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[4] The Utah Supreme Court has consistently noted that even the views of individual *legislators* are not persuasive evidence of legislative intent. *See, e.g., Rothstein v. Snowbird Corp.*, 2007 UT 96, ¶ 10, 175 P.3d 560, *Wood v. Univ. of Utah Med. Ctr.*, 2002 UT 134, ¶19, 67 P.3d 436. In light of that, reliance on the statements of an individual *lobbyist* to try to discern legislative intent is baffling.

Random House Webster's Unabridged Dictionary 1965 (2d ed. 2001) (defining "the" similarly to *Black's Law Dictionary*). If "an" intent to harass or embarrass were sufficient to award attorney fees, then Rule B-15 would have used that indefinite article. That approach is not only inconsistent with Rule B-15's plain language, but also with Legislature's encouragement of citizen participation. For "an" intent to harass or embarrass would delegitimize even valid and legal purposes that might incidentally be accompanied by an allegedly hostile intent. As the Division argues, some "animus ... likely accompanies all litigation," or at least most, and that has never been enough to "provide the basis for attorney fees." *Division Response to Mot. to Dismiss* 3.

ACD concedes, as it must, that the preamble to the federal regulations that Utah intended to follow describes the standards "in bad faith for the purpose of harassing and embarrassing" and "in bad faith *and* for the purpose of harassing and embarrassing" as being identical. *See Petitioners' Memorandum Supporting Motion to Dismiss*, pp. 5-6. Rather than responding to that point, ACD complains that, because Petitioners contend that the statute is unambiguous, they should not be citing to legislative history. ACD's complaint misses the mark: Petitioners believe the statute unambiguously includes two components, but recognize that if the Board sees it otherwise, the Board may find the preamble to the federal regulation (which regulation Utah intended to follow) informative of that regulation's meaning.

III. Rule B-15 Requires Both Objective And Subjective Bad Faith.

ACD next argues that "Rule B-15 sets forth a single subjective standard, not dual objective and subjective tests." *ACD Opp.*, p. 7. Ironically, ACD begins its analysis by criticizing

Petitioners for mentioning cases applying Utah's bad faith statute, Utah Code Ann. § 78B-5-825(a), *id.*, but of course it was *ACD* who first cited such cases. *See ACD's Petition for Award of Costs and Fees*, p. 3.

ACD does not dispute that virtually all courts interpret virtually all bad-faith attorney fee statutes as requiring both objective and subjective bad faith. Indeed, ACD has not cited *any* authority from *any* jurisdiction, let alone from Utah, that has ever awarded bad faith attorney fees without finding *both* objective and subjective bad faith. Instead, ACD simply urges the Board to disregard this uniform body of law, and then says that Petitioners "have no support in B-15" for an objective component. *ACD Opp.*, p. 8. But the rule's plain language *does* support Petitioner's reading, for if an intent to harass or embarrass were all that were required to obtain fees, then Rule B-15's immediately preceding words "in bad faith" would be wholly unnecessary. Such a reading would be contrary to a fundamental canon of statutory construction. *See Petitioners' Memorandum Supporting Motion to Dismiss*, p. 5 (noting that general rules of statutory construction counsel against interpreting statutory language as surplusage). ACD has no response to this point.

ACD also argues that it was not required to allege that Petitioners' sole purpose was to harass or embarrass, as this is a matter of proof, not pleading. Again, ACD misstates the burden imposed on it. It is not enough to simply make a conclusory allegation to avoid dismissal. That argument, as noted above, ignores case law, administrative rules, and this Board's own prior ruling requiring the pleading of an adequate factual basis. ACD must plead facts that, if proven, would carry ACD's burden of proof.

Finally, ACD argues that inclusion of a frivolousness element would "invite[] the Board to re-evaluate the merits of the case," claiming that Petitioners are "re-arguing the merits" in their memorandum. *ACD Opp.*, p. 8. But Alton's argument confuses the question whether Petitioners *lost* with the separate question of whether Petitioners' arguments were *frivolous*. *See Verdi Energy Group v. Nelson*, 2014 UT App 101 ¶31 ("[T]to support a conclusion that the action lacks merit, the district court must determine not only that Verdi's claims were unsuccessful but also that they were so deficient that Verdi could not have reasonably believed them to have a basis in law and fact.") Every single claim for bad faith attorney fees requires the party seeking fees to show not only that the opposing party's claims were rejected, but that those claims were frivolous. That is not re-arguing or asking the Board to re-evaluate the merits; that is following the same procedure used in all bad faith fee proceedings. Indeed, it was *ACD's Petition* that delineated the six allegedly frivolous or meritless arguments of Petitioners – Petitioners obviously had to respond to those examples.

IV. ACD's Remaining Attempts at Opposition are Unpersuasive, Particularly Those Dealing With Constitutional Issues.

ACD's final point is a catchall argument that "Petitioners' remaining arguments are inapplicable to a motion to dismiss." That is incorrect.

ACD initially asserts that whether the governing Rule B-15 has both objective and subjective elements is "outside the pleadings at this stage." That is a perplexing contention: Before it can determine whether ACD's petition states a claim, the Board must determine what the claim requires. If a claim for attorney fees under Rule B-15 requires objective and subjective

bad faith, then the Board must assess whether sufficient facts have been pled on each prerequisite. ACD wants to skip this step precisely because its fee petition does not plead sufficient facts.

ACD next says that Petitioners' constitutional concerns "misconstrue Alton's allegations." ACD acknowledges that "Petitioners' public advocacy campaigns are clearly constitutionally-protected speech," but says that it merely wants the board to infer proscribed intent from this speech, not "independent[ly] sanction" it. ACD's admission is both remarkable and dispositive: Regardless of whether it is characterized as a sanction or inference, ACD is implicitly admitting that constitutionally protected speech is the *factual* basis for its allegation of purported "bad faith," which it claims justifies a $1.2 million attorney fee claim against the Petitioners. Constitutionally protected speech cannot be evidence of bad faith, unless there is something improper about exercising one's constitutional rights. Clearly, there is not; that is why the speech is protected.

ACD cites *Snyder v. Phelps*, 562 U.S. ____, 131 S.Ct. 1207 (2011) and *United States v. Alvarez*, 567 U. S. ____, 132 S.Ct. 2537 (2012) in support of its contention that it may rely solely upon constitutionally protected speech to impose liability upon Petitioners. Those cases stand for the exact opposite proposition: In both instances, the United States Supreme Court recognized that liability *cannot* be imposed upon a party based upon constitutionally protected speech. As the court wrote in *Snyder*,

> [i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. . . . Speech is powerful. It can stir people to action, move them

> to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.

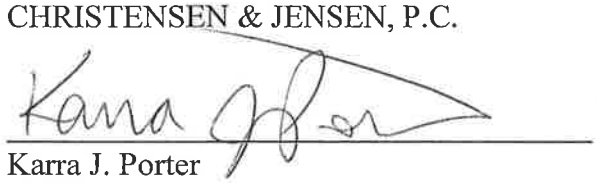
Snyder at 1220.

CONCLUSION

For the reasons set forth above and in *Petitioners' Memorandum Supporting Motion to Dismiss* (and in *Petitioners' Opposition to ACD's Motion for Discovery*), Petitioners respectfully request that *ACD's Petition for Award of Fees and Costs* be dismissed.

DATED this 9th day of May, 2014.

CHRISTENSEN & JENSEN, P.C.



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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of May, 2014, a true and correct copy of the foregoing **REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS ALTON COAL DEVELOPMENT'S PETITION FOR AWARD OF COSTS AND EXPENSES** was delivered via email to the following:

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